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CORONAVIRUS AND SOCIAL SECURITY ENTITLEMENT IN THE UK*

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Abstract

The social and economic effects of the Covid-19 pandemic have prompted urgent wide-ranging reforms to social security across the UK, most of which have been implemented via secondary legislation. In a number of respects the changes that have been made have extended support, either by relaxing some of the stricter elements of conditionality or by raising needs thresholds or allowance rates. With the shutdown that has affected large parts of the economy, huge numbers of the working age population have had to turn to the welfare state for support, swelling the numbers of benefit claimants. Changes have also been made to the processes for claiming and the arrangements for the determination of appeals. This article examines the key changes that have been made and assesses their implications, both immediate and over the longer term.

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Introduction

The Coronavirus ('Covid-19') pandemic has had a massive impact on the social security system in the UK as a result of the Government's policy response to it and the social and economic consequences. Huge and rapid increases in the need for financial support for individual households resulting from the economic shutdown that started in March 2020 led to an unprecedented surge in benefit claims from those unable to continue in work. In the first two weeks of January 2020, before the virus was identified in the UK, approximately 100,000 people applied for universal credit (UC),¹ but the Department for Work and Pensions (DWP) reported that there were 950,000 applications in the final two weeks of March 2020² when the epidemic had taken hold and there were 1.5m in the six weeks to 12 April 2020.³

Some of the changes to the system have been administrative, such as the closure of jobcentres and suspension of in person health assessments for employment and support allowance (ESA), personal independence payment (PIP) and industrial injuries disablement benefit⁴ (combined with a six month extension of disability benefits awards where reassessment is due within the next three months⁵). However, many legislative changes have been made, governing procedural requirements, rules on entitlement to and levels of specific benefits or affecting people in particular situations, such as prisoners on temporary release⁶ and employees who are furloughed under the Coronavirus Job Retention Scheme.⁷ Copious legislative adjustments have been made via regulations.⁸

¹ <https://stat-xplore.dwp.gov.uk/webapi/jsf/tableView/tableView.xhtml>

² See <https://www.theguardian.com/society/2020/apr/01/950000-apply-for-universal-credit-in-two-weeks-of-uk-lockdown> BBC News Report, 'Nearly a million universal credit claims in past two weeks', 1 April 2020 <https://www.bbc.co.uk/news/uk-politics-52129128>

³ See the evidence by Minister for Welfare Delivery, Will Quince MP, to the House of Commons Work and Pensions Committee, 23 April 2020, at <https://parliamentlive.tv/Event/Index/86ed5d4f-9daf-40b0-9b97-384ddc6cc897>

⁴ See e.g. the respective reports on 16 March 2020 of a three month suspension of face-to-face disability assessments in Great Britain and Northern Ireland: <https://www.gov.uk/government/news/face-to-face-health-assessments-for-benefits-suspended-amid-coronavirus-outbreak> and <https://www.communities-ni.gov.uk/news/minister-announces-measures-protect-most-vulnerable-ensure-delivery-social-security-services>

⁵ See the evidence by the Minister for Disabled People, Health and Work, Justin Tomlinson MP, to the House of Commons Work and Pensions Committee, 23 April 2020, at <https://parliamentlive.tv/Event/Index/86ed5d4f-9daf-40b0-9b97-384ddc6cc897>.

⁶ Social Security (Coronavirus) (Prisoners) Regulations 2020 (SI.No.409/2020) and the Social Security (Coronavirus) (Prisoners) Regulations (Northern Ireland) 2020 (SR.No.63/2020). These new regulations ensure the benefit entitlement of temporarily released prisoners (temporary release being a strategy to limit the spread of the virus and enhance prison safety), including as members of households supported by means tested benefits. This reform is predicted to help over 4,000 prisoners (160 in Northern Ireland): DWP, *Explanatory Memorandum to the Social Security (Coronavirus) (Prisoners) Regulations 2020*, 2020 No. 409

This article is an attempt to outline, understand and critically assess the implications of the legislative and administrative changes that have been made to the UK social security system as a result of the Coronavirus pandemic. It is delivered in two distinct parts. The first part provides a detailed overview of the immediate legislative changes that the Government and devolved government administrations have introduced in response to the outbreak of the pandemic in the UK since March 2020. The second part of the article provides an analysis of emerging issues resulting from those changes that have been implemented.

The first part begins with a summary of legislative changes to UC, jobseeker's allowance (JSA) and housing benefit (HB) and an overview of measures that have been introduced for those who are unable to work due to Coronavirus. The second part provides analysis of the implications of the Covid-19 related changes to the social security system. It is hoped that this article will provide an encompassing picture of the social security system in the immediate wake of the current crisis. However, it is also important to acknowledge that the precise trajectory of the epidemic in the UK has been uncertain, and that social security reforms across the UK are not only predominantly short term but are also liable to modification as government adjusts the guidance and controls on social interaction and economic activity (for which there is a broad statutory framework in the form of the Coronavirus Act 2020 and the Coronavirus (Scotland) Act 2020) as the epidemic progresses and its health policy and economic strategy in response to it evolves further. Therefore, it would be unwise to attempt to predict the Government's next steps in the legislative and policy arenas. If we look to what is arguably the only other comparable point of reference in terms of the scale of unemployment - the "Great Depression" at the end of the 1920s – it may be possible to tentatively surmise that increasing budgetary pressure on the Treasury could lead to the necessity for difficult decisions in the aftermath of the crisis. As has been the case, particularly in the last ten years, it could be the social security system which again falls victim to the rationalisation of public finances.⁹

Changes to benefits and processes

Universal credit, jobseeker's allowance and housing benefit

(DWP, 2020), para 12.2; ; Department for Communities, *Explanatory Memorandum to the Social Security (Coronavirus) (Prisoners) Regulations (Northern Ireland) 2020 SR 2020 No.63* (Department for Communities, 2020) para 12.2..

⁷ See the *Tax Credits (Coronavirus, Miscellaneous Amendments) Regulations 2020 (SI 2020/534)*. Under these regulations, for example, those who resume working, but no longer on a full-time basis, after being furloughed or shielding due to coronavirus, will nevertheless continue to be entitled to working tax credit for up to eight weeks and could get it for a further four weeks after that..

⁸ Note that "coronavirus disease" is defined in the various regulations as referring specifically to "COVID-19".

⁹ N Harris, *Social Security Law in Context*, (Oxford University Press 2000) pp. 81-82; See also, N Timmins, *The Five Giants: A Biography of the Welfare State* (Harper Collins 2018).

With so many people facing a sudden loss of income as a result of the business shutdown under the national policy for containment of the virus introduced in March 2020, the role of basic means tested support via UC has acquired greater prominence and public significance. The scale of the pandemic's impact can be seen in the DWP's UC declarations (i.e. claims) and advance payment figures. Fig. 1 details a rolling 7-day average of UC declarations. In the period from 16 March 2020 (the lockdown started on 23 March) to 5 May 2020, there were more than 2.5 million UC declarations, with a peak of over 100,000 individual declarations per day on 30 March 2020. Though numbers have fallen back since the peak in late March, towards the end of April and into early May applications were still at nearly three times the pre-crisis level: see fig 1.

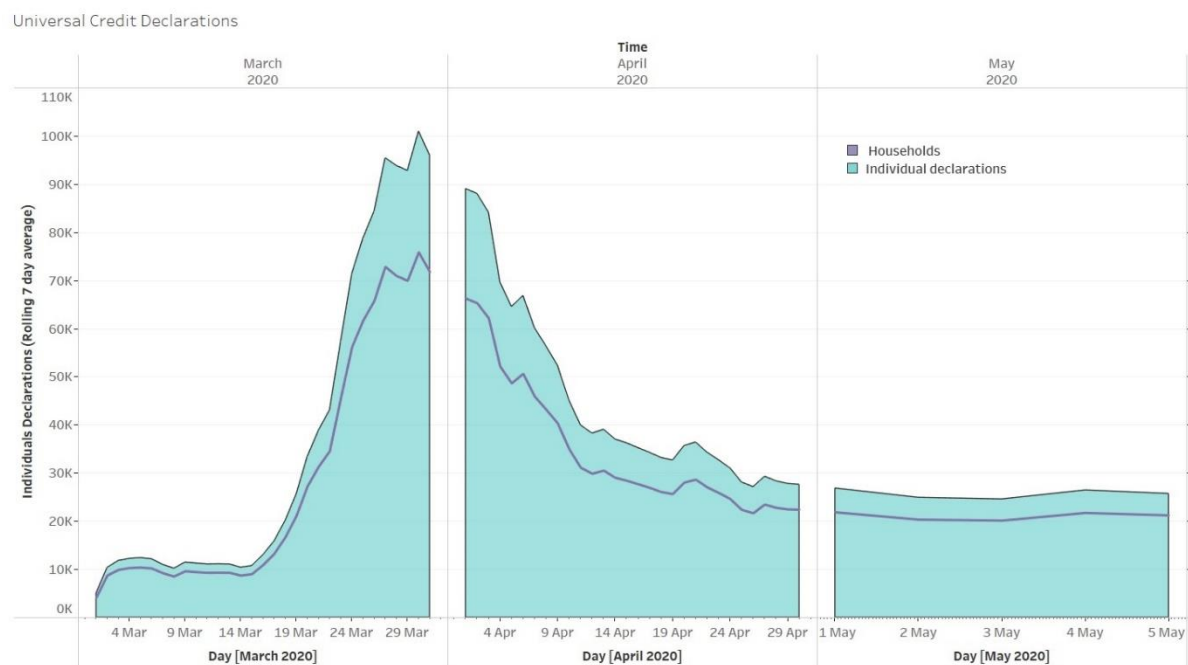


Fig. 1: Rolling 7-day average of Universal Credit declarations.¹⁰

Fig. 2 details the rolling 7-day average of advances and whether they were for budgeting, changes of circumstances or new claims/benefit transfers. The numbers of advances made, unsurprisingly, peaked later than applications, on the 9 April 2020, with the majority being new claims and benefit transfer advances.

¹⁰ Interactive version available at: <https://tinyurl.com/UC-JSSL>

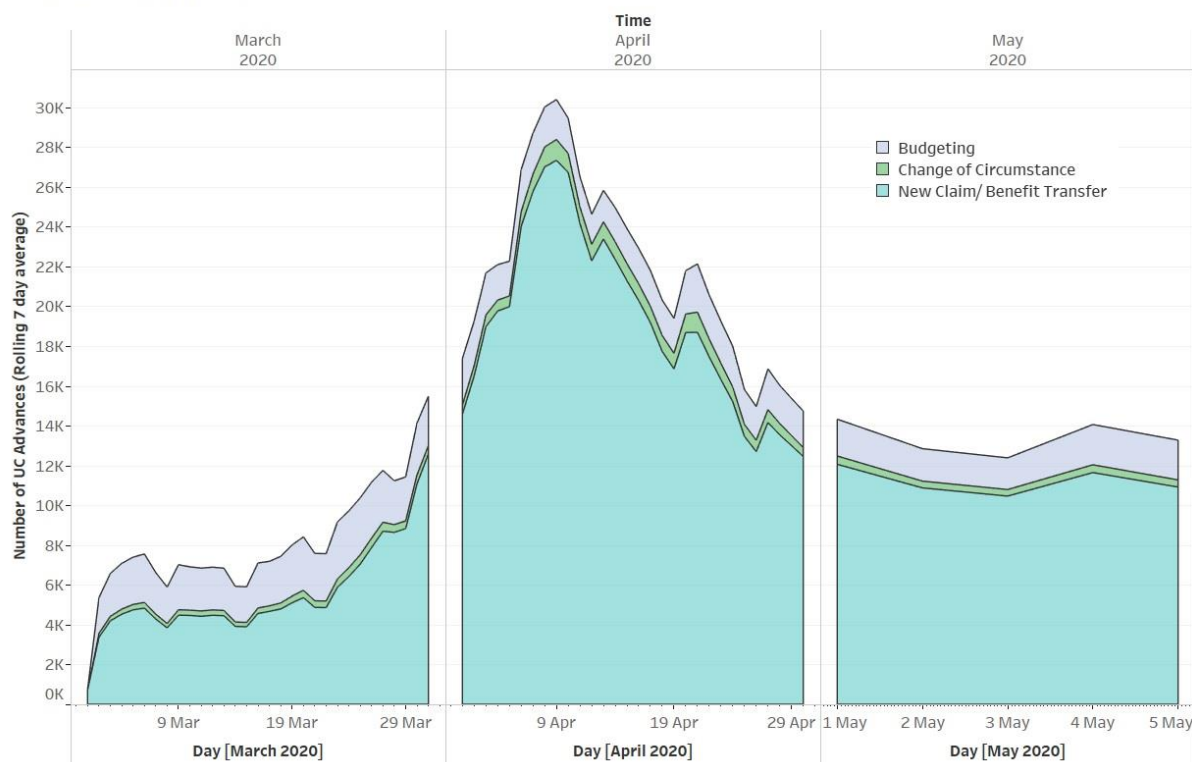


Fig.2: Rolling 7-day average of Universal Credit advances.¹¹

The crisis intensified political pressure on the Government to increase the level of support UC provides. Taking this course could be justified even among fiscal conservatives as a move consistent with a general policy of loosening the public purse strings to ensure social protection at a time of national crisis. The standard allowance within UC has been increased across all age groups by just over £1,000 per annum (equivalent to an extra £20 per week) from what it would have been under the 2020 uprating – for example, from £323.22 to £409.89 per assessment period (month)¹² for a single claimant aged over 25 and from £507.37 to £594.04 for joint claimants at least one of whom is over 25.¹³ The new rates are applicable to awards arising from claims in an assessment period ending on or after 6 April 2020.¹⁴

¹¹ Interactive version available at: <https://tinyurl.com/UC-JSSL>

¹² Universal Credit Regulations 2013 (SI 2013/376), reg.21(1) (as amended): “An assessment period is a period of one month beginning with the first day of entitlement and each subsequent period of one month during which entitlement subsists”.

¹³ Universal Credit Regulations 2013 (SI 2013/376), as amended by the Social Security Benefits Up-rating Order 2020 (SI 2020/234) and the Social Security (Coronavirus) (Further Measures) Regulations 2020 (SI 2020/371), reg.3.

¹⁴ See the Social Security (Coronavirus) (Further Measures) Amendment Regulations 2020 (SI 2020/397).

For the self-employed, whose work has been affected by the social distancing and self-isolation requirements introduced by the Government, there has been a relaxation of the “minimum income floor” (MIF). The MIF itself aims to prevent abuse or fraud and to reduce a person’s ability to rely on UC to subsidise unprofitable self-employment.¹⁵ The MIF¹⁶ applies to persons who are in gainful self-employment and would ordinarily be covered by the all-work related conditions for entitlement to benefit.¹⁷ It provides, in the case of a single claimant, that where the claimant’s income during the assessment period is less than their “individual threshold” they are nevertheless to be treated as if their earned income was equal to that threshold.¹⁸ (That has the effect that they are classed as claimants to whom no work-related requirements apply.¹⁹) The “individual threshold” is set essentially with reference to the amount that someone of their age would earn under the National Minimum Wage Regulations for working 16 or (in most cases) 35 hours per week (depending on the circumstances), less notional national insurance and income tax deductions.²⁰ The assistance provided to the self-employed by the coronavirus changes²¹ arises from a new discretion for the Secretary of State to, inter alia, treat the individual threshold (or the separate threshold which applies where the claimant is a member of a couple) “as if it were a lesser amount (including zero)”, meaning that in effect the MIF has been “scrapped”,²² thereby increasing the potential level of UC entitlement for many self-employed persons affected by the drying up of work or being unable to work during periods of lockdown. The Secretary of State may also delay a determination finding the claimant is in gainful employment, treat the claimant as not being in gainful employment, and exempt the employed claimant from being covered by the work search or work availability requirement, so that in any of these cases the MIF will not apply.

Turning to housing assistance, changes to determinations of the local housing allowance for the purposes of HB and UC²³ have also been provided for by increasing quite significantly the maximum local housing allowance (LHA) for particular categories of dwelling (ranging from one bedroom in shared accommodation to four bedroomed accommodation).²⁴ There

¹⁵ See J Mesher, R Poynter and N Wikeley, *Social Security Legislation 2018-19. V: Universal Credit* (London: Sweet & Maxwell, 2018), 251 and M Brewer and L Gardiner, ‘Key take-aways from the Chancellor’s package of measures to support workers in the coronavirus crisis’ Resolution Foundation, 22 March 2020, at <https://www.resolutionfoundation.org/comment/key-take-aways-chancellors-package-of-measures-to-support-workers-coronavirus-crisis/>.

¹⁶ Universal Credit Regulations 2013 (SI 2013/376), reg 62.

¹⁷ Principally, a work availability and work search requirement: see Welfare Reform Act 2012, s 22.

¹⁸ Universal Credit Regulations 2013 (SI 2013/376), reg 62(2).

¹⁹ Per the Welfare Reform Act 2012 s 19: see the Universal Credit Regulations 2013 (SI 2013/376), reg 90.

²⁰ Universal Credit Regulations 2013 (SI 2013/376), regs 88 and 90(2).

²¹ Social Security (Coronavirus) (Further Measures) Regulations 2020 (SI 2020/371), reg.2.

²² M Brewer and K Handscomb, *No work, no pay. Supporting the unemployed through coronavirus crisis* Resolution Foundation, 2020), p.5 available at <https://www.resolutionfoundation.org/app/uploads/2020/04/No-work-no-pay.pdf>

²³ In the case of UC, the changes take effect at the same time as those relating to the standard allowance (above).

²⁴ Social Security (Coronavirus) (Further Measures) Regulations 2020 (SI 2020/371), reg.4, amending the

has been a restoration of the levels of LHA to the 30th percentile for rents in local areas, as per the original rates set in 2012 (but frozen post-2015 as part of the wider benefit freeze), a level which was meant to ensure that housing benefit rates were sufficient to cover 30% of all domestic rental properties in a local area.²⁵ The Resolution Foundation has explained that this will be of most benefit to people in the areas where market rents have been rising most sharply, particularly parts of the South-East. In those areas support will increase by at least £35 per week and in a few cases up to nearly £60 per week whereas areas with little or no rent increases over recent years, such as the Wirral and Teesside, will not see any additional support.²⁶ Research by Shelter, published in April 2020, indicates that approximately 1.7 million residential private sector tenants may lose their job over the following three months as a result of the coronavirus epidemic and that two million households would be unable to afford their rent in the event of unemployment; Shelter therefore argue that as an emergency measure the LHA should be further raised to a level at which the average rent for the area is covered.²⁷ **Anticipating tenants' difficulty, the Scottish Government has increased its budget for discretionary housing payments, as noted below.**

Another change affecting HB entitlement concerns the additional earnings disregard,²⁸ which has been increased by £20 per week (from £17.10 to £37.10).²⁹ Under the Coronavirus Act 2020, the basic element within working tax credit (WTC) has been increased by approximately that amount,³⁰ so this uplift in the HB disregard aims to protect WTC recipients from what would amount to a financial clawback if they claim HB.³¹

Rent Officers (Housing Benefit Functions) Order 1997 (SI 1997/1984) (as amended), the Rent Officers (Housing Benefit Functions) (Scotland) Order 1997 (SI 1997/1995) (as amended) and the Rent Officers (Universal Credit Functions) Order 2013 (SI 2013/382) (as amended).

²⁵ This general principle is subject to a cap on LHA rates, which affects some sizes of properties in central London and some parts of inner London.

²⁶ M Brewer and L Gardiner, 'Key take-aways from the Chancellor's package of measures to support workers in the coronavirus crisis' Resolution Foundation, 22 March 2020, at <https://www.resolutionfoundation.org/comment/key-take-aways-chancellors-package-of-measures-to-support-workers-coronavirus-crisis/>

²⁷ Shelter Press Release 16 April 2020 at https://england.shelter.org.uk/media/press_releases/articles/1.7_million_renters_expect_to_lose_their_job_in_the_next_three_months

²⁸ In HB there is a standard earnings disregard of £25 for lone parents, £20 for certain persons with disabilities or entitlement to a carer's premium, or £5 (single people) or £10 couples in other cases. The *additional* earnings disregard for HB is for those working 30 or more hours per week or, where there is a dependent child or entitlement to a disability premium, 6 or more hours.

²⁹ Amendments to the Housing Benefit Regulations 2006 (SI 2006/213) and the Housing Benefit (Persons who have obtained the qualifying age for state pension credit) Regulations 2006 (SI 2006/214) made by the Social Security (Coronavirus) (Further Measures) Regulations 2020 (SI 2020/371), reg 5. The change applies throughout the tax year 2020-21. Equivalent amendments are made in Northern Ireland: the Social Security (Coronavirus) (Further Measures) Regulations (Northern Ireland) 2020 (SR 2020/53) and the Social Security (Coronavirus) (Further Measures) Amendment Regulations (Northern Ireland) 2020 (SR 2020/61).

³⁰ Coronavirus Act 2020, s.77, which applies to all four nations within the UK: s.100. The increase is from £1,960 to £3,040 (in place of the planned up-rating to £1,995).

³¹ DWP, *Explanatory Memorandum to the Social Security (Coronavirus) (Further Measures) Regulations 2020*, 2020 No. 371 (DWP, 2020), para 7.1.g.

In addition to the various increases in entitlement, the coronavirus crisis has also prompted an unprecedented relaxation of UC and JSA work availability and work search conditionality (although not of any benefit sanctions already being applied for non-compliance with the requirements in force prior to the changes³²), until the end of November 2020.³³ The specific regulation begins: “As a consequence of coronavirus disease, where a person has an award of new style JSA or an award of universal credit...”, before indicating the conditionality rules which are dis-applied.³⁴ It would not seem to be the case that the award needs to have arisen as a consequence of the disease; rather the legislator seems to have wanted to indicate the context to the rule itself, perhaps to underline its temporary nature, although that is anyway confirmed by a separate rule limiting its duration to three months (extendable for all or any particular classes of case by the Secretary of State).³⁵ The regulation bars the Secretary of State from imposing a work search requirement³⁶ on a claimant, removes any existing work search requirement, and changes the work availability condition of being able and willing take up any paid work opportunity “immediately”³⁷ to one of doing so (or attending an interview) “immediately once this regulation ceases to apply”.³⁸ For claimants who instead are still entitled to old style JSA a new regulation, also applicable for three months (but again extendable by the Secretary of State) requires them to be treated as available for and actively seeking employment for the purposes of the conditions imposed under the Jobseekers Act 1995.³⁹ Equivalent changes have also been made to the Northern Ireland legislation.⁴⁰

Where any JSA claimant is unable to work due to being ill with coronavirus, necessarily isolating at home, or caring for a child infected by the virus or having to be isolated, then during that period he or she is nevertheless to be treated as capable of work or as not having a limited capability for work;⁴¹ this means that the period in question will not count

³² See the response on 27 April 2020 by Mims Davies MP, Parliamentary Under-Secretary for Work and Pensions to a written question, at <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-03-17/30856/>

³³ Social Security (Coronavirus) (Further Measures) Regulations 2020 (SI 2020/371), reg.10(2); Social Security (Coronavirus) (Further Measures) Regulations (Northern Ireland) 2020 (SR 2020/53), r.10(2).

³⁴ Social Security (Coronavirus) (Further Measures) Regulations 2020 (SI 2020/371), reg.6(1); Social Security (Coronavirus) (Further Measures) Regulations (Northern Ireland) 2020 (SR 2020/53), r.6(1).

³⁵ Social Security (Coronavirus) (Further Measures) Regulations 2020 (SI 2020/371), reg.6(2); Social Security (Coronavirus) (Further Measures) Regulations (Northern Ireland) 2020 (SR 2020/53), r.6(2).

³⁶ Per the Welfare Reform Act 2012 s.17(1).

³⁷ Per the Welfare Reform Act 2012 s.18(1).

³⁸ Social Security (Coronavirus) (Further Measures) Regulations 2020 (SI 2020/371), reg.6(1)(a)-(c); Social Security (Coronavirus) (Further Measures) Regulations (Northern Ireland) 2020 (SR 2020/53), r.6(1)(a)-(c).

³⁹ Social Security (Coronavirus) (Further Measures) Regulations 2020 (SI 2020/371), reg.7; Social Security (Coronavirus) (Further Measures) Regulations (Northern Ireland) 2020 (SR 2020/53), r.7.

⁴⁰ Social Security (Coronavirus) (Further Measures) Regulations (Northern Ireland) 2020 (SR 2020/53).

⁴¹ Social Security (Coronavirus) (Further Measures) Regulations 2020 (SI 2020/371), reg.8, Social Security (Coronavirus) (Further Measures) Regulations (Northern Ireland) 2020 (SR 2020/53), r.8. Normally the claimant may have no more than the prescribed number of periods of short term or longer term sickness within a 12

as a period of sickness that could, if the claimant has more than a prescribed number of periods of sickness within a 12 month period, affect entitlement to JSA.⁴²

“Limited capability for work”

Having a “limited capability for work” (LCFW) is a necessary condition of entitlement to ESA.⁴³ There are normally seven waiting days after the start of a person’s limited capability before there is entitlement.⁴⁴ However, the Secretary of State now has a discretion not to apply this waiting period in the case of any claimant affected by coronavirus by being infected or contaminated with it, in isolation or caring for a child or young person in their household who is infected or isolating due to the virus.⁴⁵ A change has also been made in relation to being treated as a person with a LCFW. The Secretary of State has a power to prescribe cases where someone is to be treated as having a LCFW for the purposes of ESA⁴⁶ or UC.⁴⁷ In response to coronavirus, the Secretary of State has used the power in order to acquire a discretion to treat someone who has the disease, is in isolation or is caring for a child who has with the disease or is in isolation as having a LCFW.⁴⁸

Statutory sick pay

Particularly in the very early stages of the epidemic in the UK, questions around eligibility for SSP for those whose ability to work was affected directly or indirectly by the virus have been prominent. SSP is a benefit paid by the employer when the employee is unable to work due to illness. It is payable (if the employee is earning above a prescribed threshold level⁴⁹) for the duration of the period of inability to work, up to 28 weeks, at the prescribed rate of up to £95.85 per week. For those claiming SSP due to Covid-19, entitlement would run for the duration of their isolation, although if an infected person’s symptoms persisted such as to make them unable to work then SSP entitlement should continue. The headline changes, applicable to cases on or after 13 March 2020, are provision for reimbursing employers of

month period during which they will remain entitled to JSA. Weeks of sickness etc due to coronavirus will therefore not now count as one or more of those periods of inability to work due to sickness.

⁴² This change will apply for eight months from 13 March 2020 in Northern Ireland (Social Security (Coronavirus) (Further Measures) Regulations (Northern Ireland) 2020 (SR 2020/53), r.10(2)) or 30 March 2020 in England, Scotland and Wales (Social Security (Coronavirus) (Further Measures) Regulations 2020 (SI 2020/371), reg.10(2)).

⁴³ Welfare Reform Act 2007, s.1(3)(a).

⁴⁴ Welfare Reform Act 2007 Sched.2 para 2; Employment and Support Allowance Regulations 2008 (SI 2008/143), reg 144(1), as amended.

⁴⁵ Employment and Support Allowance and Universal Credit (Coronavirus Disease) Regulations 2020 (SI 2020/289), reg.2.

⁴⁶ Welfare Reform Act 2002 Sched.2 para 1.

⁴⁷ Welfare Reform Act 2012 s.37(6).

⁴⁸ Employment and Support Allowance and Universal Credit (Coronavirus Disease) Regulations 2020 (SI 2020/289), reg.3, in force for eight months from 13 March 2020: reg.5.

⁴⁹ I.e. the lower earnings limit (LEL) for the requirement to pay National Insurance contributions: Social Security Contributions and Benefits Act 1992 s.153(3) and Sch.11 paras 1 and 2. The LEL is set at £120 per week in 2020-21.

fewer than 250 employees for coronavirus-related payments of SSP (up to a prescribed limit),⁵⁰ the payment of SSP to the employee from the first day of inability to work due to incapacity rather than the fourth day,⁵¹ and the introduction of a right to SSP not only if suffering from the Covid-19 infection itself but also if self-isolating at home due to a suspected (or presumably a confirmed) infection in a member of the same household. Those self-isolating in this way are to be deemed incapable of work for SSP purposes.⁵² The official guidance at the time of writing⁵³ is that an infected person must self-isolate for up to seven days from first identifying symptoms of the disease and that that person's fellow household members must self-isolate for 14 days from that date. Amendments to the SSP regulations have brought the guidance into law for the purposes of the prescription of incapacity for work.⁵⁴ Also added to the list of those deemed, for the purposes of SSP, as incapable of working due to coronavirus are those defined in the public health guidance as having extreme vulnerability and at very high risk of severe illness from the virus due to an underlying health condition and who have been officially advised to follow shielding measures.⁵⁵

Normally, where a claimant is off work ill for less than seven days he or she merely has to self-certify the unfitness for work; for longer absences the claimant has to provide a 'fit note' to the employer (a note from his/her general practitioner or hospital doctor certifying that the claimant is either "unfit for work" or "may be unfit for work"). However, those self-isolating due to Covid-19 are to contact the NHS hotline (NHS 111) for an "isolation note" rather than obtaining a fit note. The self-employed, many of whom became unable to work due to the economic effects of the Government's lockdown in response to the epidemic, are

⁵⁰ SSP (Coronavirus) (Funding of Employers' Liabilities) Regulations 2020 (SI 2020/512). Refund claims cannot be made later than one year after either the last qualifying day of the period of coronavirus-related incapacity for work or 26 May 2020: reg.7. The maximum refund is £191.70 (equivalent to two weeks' maximum SSP) multiplied by the number of employees enrolled in PAYE schemes: reg.3. See also the SSP (Coronavirus) (Funding of Employers' Liabilities) (Northern Ireland) Regulations 2020 (SR 2020/513).

⁵¹ Disapplication of the Social Security Contributions and Benefits Act 1992 s 155(1) by the SSP (Coronavirus) (Suspension of Waiting Days and General Amendment) Regulations 2020 (SI 2020/374), reg.2; and in Northern Ireland, disapplication of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 s 151(1) by the SSP (Coronavirus) (Suspension of Waiting Days and General Amendment) Regulations (Northern Ireland) 2020 (SR 2020/54), r.2.

⁵² Amendment of the SSP (General) Regulations 1982 (SI 1982/894) by the SSP (Coronavirus) (Suspension of Waiting Days and General Amendment) Regulations 2020 (SI 2020/374), reg.3. The latter regulations made adjustments in place of earlier amendments which referred to the Public Health England guidance on isolating: see the SSP (General) (Coronavirus Amendment) (No 2) Regulations 2020 (SI 304/2020) and the SSP (General) (Coronavirus Amendment) Regulations 2020 (SI 2020/287).

⁵³ See www.gov.uk/guidance/coronavirus-covid-19-information-for-the-public.

⁵⁴ Schedule to the SSP (General) Regulations 1982 (SI 1982/894) inserted by the SSP (Coronavirus) (Suspension of Waiting Days and General Amendment) Regulations 2020 (SI 2020/374).

⁵⁵ Amendment of the Schedule to the SSP (General) Regulations 1982 (SI 1982/894) by the SSP (General) (Coronavirus Amendment) (No.3) Regulations 2020 (SI 2020/427) with effect from 16 April 2020; amendment of the SSP (General) Regulations (Northern Ireland) 1982 (SR 1982/263) by the SSP (General) (Coronavirus Amendment) (No.3) Regulations (Northern Ireland) 2020 (SR 2020/66).

not eligible to claim SSP. Likewise, as a result of the earnings threshold in particular, many employees – mostly women – are also ineligible.⁵⁶

The changes to SSP introduced in response to Covid-19 (apart from the employer refund) were initially limited in time to eight months from 13 March 2020, but this time restriction was soon after removed and the changes made indefinite, although the Government's intention is to keep them under review.

Carer's allowance

Carer's allowance (CA) is a non-means tested benefit to which a person may be entitled if "engaged and regularly engaged in caring for at least 35 hours a week" for a "severely disabled person", provided, essentially, the carer is not "gainfully employed" and is a relative of the disabled person.⁵⁷ The weekly rate of CA in 2020/21 is £67.25 and has not been increased in response to Covid-19.⁵⁸ In England and Wales, an amendment to the regulations in response to coronavirus has at least the effect of enabling entitlement to CA to continue when the care is unable to be provided because either the claimant or the person for whom he or she provides care is subject to isolation due to coronavirus or because of coronavirus infection or contamination.⁵⁹ An equivalent amendment has been made in Scotland, where CA is one of the benefits devolved to the Scottish Government,⁶⁰ and in Northern Ireland.⁶¹ Across the UK, the adjustment to the rules applies for eight months.

Funeral expenses

It has taken the coronavirus pandemic finally to precipitate an increase in the element of the Social Fund funeral expenses payment that covers "other funeral expenses".⁶² This element is intended to cover expenses, such as funeral director's fees, car hire and flowers, that do not fall within one of the prescribed categories of expense, such as the cost of a new burial plot, burial or cremation fees or medical certification, that are covered in full (subject however to any deductions that fall to be made due for example to the deceased's assets or

⁵⁶ See Trade Union Congress, 'Sick pay for all' (2020) at: <https://www.tuc.org.uk/research-analysis/reports/sick-pay-all>

⁵⁷ Social Security Contributions and Benefits Act 1992 s.70 and the Social Security (Invalid Care Allowance) Regulations 1976 (SI 1976/407) as amended.

⁵⁸ It is reported by the Disability Benefits Consortium that a judicial review to this failure to increase CA in response to the epidemic is being prepared by Bindmans Solicitors: see <https://www.rightsnet.org.uk/forums/viewthread/16088/>

⁵⁹ Social Security (Coronavirus) (Further Measures) Regulations 2020 (SI 2020/371), reg.9. This is in force for eight months: see reg 10(2).

⁶⁰ The Carer's Allowance (Coronavirus) (Breaks in Care) (Scotland) Regulations 2020 (SSI 2020/117). See further below.

⁶¹ Social Security (Coronavirus) (Further Measures) Regulations (Northern Ireland) 2020 (SR 2020/53), r.9.

⁶² See the Social Fund Maternity and Funeral Expenses (General) Regulations 2005 (SI 2005/3061), reg 9 (3)(g).

certain benefit arrears which were payable to the deceased at the date of death).⁶³ The “other funeral expenses” element was increased from £600 to £700 in 2003 and has remained at that level ever since.⁶⁴ The new limit is £1,000 and came into effect on 8 April 2020 in England and Wales⁶⁵ and in Northern Ireland.⁶⁶ A similar change has been made to the regulations governing funeral expense assistance (now “funeral support payment”) in Scotland, which scheme replaced the Social Fund arrangements there in September 2019.⁶⁷ (In addition, a power under the Coronavirus (Scotland) Act 2020 to relax benefit application time limits⁶⁸ has been used to extend the time limit for applying for funeral support.⁶⁹) Despite the increase in the “other funeral expenses” limit, this element of funeral support is still very low relative to the actual expenses likely to be incurred, a recurrent source of criticism of the way the state supports funeral costs incurred by society’s poorer members.⁷⁰

The response at devolved and local government level

In legislative terms, Northern Ireland’s social security response to coronavirus has mirrored Westminster’s. Regulations (cited above) affecting SSP, UC, ESA, JSA and HB make, at face value at least, the same set of changes to those benefits in Northern Ireland as have been made to their equivalents in Great Britain. However, the effects on at least some claimants will be rather different. In Great Britain the benefit cap limits the social security income to households in receipt of out-of-work benefits for at least nine months, but not any disability benefit, to the equivalent of £20,000 per year (£23,000 in London). In Northern Ireland, although a cap at the same level technically applies,⁷¹ any capped claimant with dependent children receives a supplementary payment equivalent to the amount lost to the cap.⁷² In practice this means there are virtually no capped claimants in Northern Ireland.

⁶³ Social Fund Maternity and Funeral Expenses (General) Regulations 2005 (SI 2005/3061), reg 10.

⁶⁴ Note that the limit is £120 if the deceased had a pre-paid funeral plan: Social Fund Maternity and Funeral Expenses (General) Regulations 2005 (SI 2005/3061), reg. 9(10).

⁶⁵ Under the Social Fund Funeral Expenses Payment (Coronavirus) (Amendment) Regulations 2020 (SI 2020/405).

⁶⁶ Social Fund Funeral Expenses Payment (Coronavirus) (Amendment) Regs (Northern Ireland) (SR 2020/62).

⁶⁷ Funeral Expense Assistance and Young Carer Grants (Up-rating) (Miscellaneous Amendments) (Scotland) Regulations 2020 (SSI 2020/99), amending the Funeral Expense Assistance (Scotland) Regulations 2019 (SSI 2019/292) with effect from 1 April 2020.

⁶⁸ Social Security (Scotland) Act 2018 s 52B inserted by the Coronavirus (Scotland) Act 2020 Sch 7 para 4.

⁶⁹ Social Security Scotland notice at <https://www.socialsecurity.gov.scot/news/making-sure-people-impacted-by-covid-19-get-our-support>

⁷⁰ See N Harris, ‘Unsuitable Arrangements: Funeral Expenses and the Benefits System’ (2014) 21(3) J.S.S.L 111-135.

⁷¹ Welfare Reform and Work (Northern Ireland) Order 2016 (2016 no 999, NI 1) art 5.

⁷² This was introduced by the Welfare Supplementary Payment Regulations (Northern Ireland) 2016 (SR 2016/178) part 2 and continues to be made as an administrative payment following the expiry of the legislative provision at the end of March 2020 – see Department for Communities, ‘Administrative welfare supplementary payments’ (Belfast: Department for Communities, 2020) <https://www.communities-ni.gov.uk/articles/administrative-welfare-supplementary-payments>

A Discretionary Support scheme was introduced in Northern Ireland in 2016⁷³ following the ending of Social Fund crisis loans and community care grants and is intended to help low income⁷⁴ households deal with exceptional or extreme situations of need that present a risk to their health, well-being or safety. One-off payments in the form of loans or grants may be available, subject to eligibility criteria. An amendment made in March 2020⁷⁵ extends grant eligibility to where the grant is to cover living expenses where the claimant or their immediate family⁷⁶ have been diagnosed with Covid-19 or advised to self-isolate in accordance with the official public health guidance. In normal circumstances, claimants could receive one Discretionary Support non-repayable grant in a 12-month period – in the current crisis, provision has been made to allow more than one grant to be paid.⁷⁷ The scheme has recently been extended to full-time students who are facing hardship as a direct result of Covid-19. Also in response to Covid-19, the threshold income above which there is no eligibility for discretionary support was raised in April 2020 by 12.5% from £18,137 to £20,405.⁷⁸

The major income replacement benefits are not devolved to Scotland, where the main changes to social security legislation have concerned process rather than eligibility or benefit levels. Being affected by coronavirus is explicitly recognised as “good reason” for missing a deadline for either an application or a late request for redetermination (equivalent to mandatory reconsideration in the UK system). Meanwhile, Social Security Scotland is temporarily allowing an additional nine weeks after the usual deadlines (which vary by benefit) to complete a redetermination.⁷⁹ The Scottish Government has provided a total of £350 million across the Scottish Welfare Fund, council tax support, and a new Scottish “Food Fund” to underpin local authority “support [to] households who may experience barriers in accessing food”.⁸⁰ It has also increased the budget for discretionary housing payments by one-third.⁸¹ Wales has few devolved social security competences, but the

⁷³ The Discretionary Support Regulations (Northern Ireland) 2016 (SR 2016/270).

⁷⁴ To be eligible, they must inter alia be on an income no higher than 40 hours per week at or below the national minimum wage paid weekly – just below £15,000 when the Discretionary Support scheme was first introduced.

⁷⁵ The Discretionary Support (Amendment) (COVID-19) Regulations (Northern Ireland) 2020 (SR 2020/44), amending reg.12 of the 2016 Regulations (SR 2016/270) (above).

⁷⁶ “Immediate family” is defined as “members of a household for whom the claimant has financial responsibility”: Discretionary Support Regulations (Northern Ireland) 2016 (SR 2016/270), reg.3.

⁷⁷ Discretionary Support Regulations (Northern Ireland) 2020 (SR 2020/44), reg. 2, amending reg. 12 of 2016 Regulations (SR 2016/270) above.

⁷⁸ Discretionary Support (Amendment No.2) Regulations (Northern Ireland) (SR 00/2020).

⁷⁹ Social Security (Scotland) Act 2018 asp 9 s43, 52A, 52B, as amended by Coronavirus (Scotland) Act 2020 asp 7 s8 and sch 7, para 1-5

⁸⁰ Housing and Social Justice Directorate, ‘<https://www.gov.scot/publications/coronavirus-covid-19-food-fund-guidance-to-local-authorities/pages/the-food-fund/>’ at: <https://www.gov.scot/publications/coronavirus-covid-19-food-fund-guidance-to-local-authorities/pages/the-food-fund/> [accessed 10th May 2020].

⁸¹ See <https://news.gov.scot/news/extra-funding-to-support-tenants>.

Welsh Government has re-issued guidance for its Discretionary Assistance Fund, stating the applications will be “treated with greater flexibility and discretion.”⁸²

Arguably the major impact of coronavirus on devolved social security has been to delay the development of distinctive provision. In Northern Ireland, a review of the supplementary payments that disapply the benefit cap and social sector size criteria (‘bedroom tax’) and provide temporary support when benefit is lost due to the change from disability living allowance (DLA) to PIP, or the time limiting of contributory ESA, were expected to be getting underway around now.⁸³ The review has been put on hold for the time being, with the existing supplementary payments continuing (as administrative payments with no legislative basis) in the interim.⁸⁴

In Scotland, the rapid roll-out of the new devolved forms of assistance following the devolution of some social security competences in 2016 has likewise been largely halted. Most immediately, this means pressing pause on regulations to put in place the new Scottish child payment (a £10 per child per week income top-up to households in receipt of UC or one of the benefits it replaces) and child disability payment, both of which have already commenced their legislative journey.⁸⁵ Inevitably, though, the remaining devolved benefits – disability assistance for older people, disability assistance for working age people and an extra payment to carers who care for more than one disabled child – all of which were due to launch by the end of 2021,⁸⁶ will also be delayed. In the interim, the Scottish Government has announced plans to invest £19.2 million to provide “special one-off Coronavirus Carer’s Allowance Supplement.” **As a result of of the Coronavirus (Scotland) (No.2) Bill, if** passed in Parliament, 83,000 eligible carers **would** receive £230.10 extra in “recognition of the additional pressure carers are under as a result of the ongoing pandemic”.⁸⁷ The Cabinet Secretary has told the Parliament that, besides the obvious obstacles to progressing and implementing regulations, the aim of developing a new approach to determining eligibility to disability benefits that better respects the dignity of the applicant could not be taken forward at this time, given the pressures on healthcare

⁸² Welsh Government, ‘Discretionary Assistance Fund (DAF)’ at: <https://gov.wales/discretionary-assistance-fund-daf> [accessed 10th May 2020].

⁸³ Northern Ireland Office, *New decade, new approach* (Belfast: NIO, 2020) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade_a_new_approach.pdf

⁸⁴ Department for Communities, ‘Administrative welfare supplementary payments’ (Belfast: Department for Communities, 2020) <https://www.communities-ni.gov.uk/articles/administrative-welfare-supplementary-payments>

⁸⁵ See Social Security Committee, Official Report 30 January 2020 <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12496>; Scottish Commission on Social Security, *Disability Assistance for Children and Young People (Scotland) Regulations 2020: scrutiny report on draft Regulations* (Edinburgh: SCoSS, 2020)

⁸⁶ Transfer of disability benefit cases from DWP to Social Security Scotland was due to take until 2024 – SA Somerville, Scottish Parliament deb 28 Feb 2019 col 54

⁸⁷ Scottish Government, Extra payment for unpaid carers (6 May 2020) <https://www.gov.scot/news/extra-payment-for-unpaid-carers/> (accessed 12 May 2020)

professionals.⁸⁸ For the time being, then, disability assistance for children, PIP and attendance allowance will continue to be available in Scotland.

The one exception to this freeze on social security legislation is that the new child winter heating assistance – previously wrapped up in the regulations for child disability payment – will now be taken forward as a standalone benefit. This will ensure that families including a child in receipt of the higher rate care element of DLA will be able to receive the payment in the coming winter. The Cabinet Secretary has also reiterated her ambition to open the Scottish child payment for applications by the end of 2020, but stressed that this may change depending on developments.⁸⁹

The pandemic will worsen an ongoing funding crisis in local authority budgets. Spending power is down by a quarter in real terms since 2011/12⁹⁰, leading to ongoing reductions in key services to those in need (such as direct payment support for disabled people with personal assistance needs and homeless services).⁹¹ The Government has responded by financing two tranches of “Covid-19 additional funding” to meet pressures across “all services”, including “getting rough sleepers off the streets” and “provide additional support across a range of vital services”.⁹² An initial £1.6 billion package to English local authorities on the 19 March 2020 – triggering £300 million of support for the devolved administrations⁹³ – has been matched by another £1.6 billion package on 18 April 2020.⁹⁴

A particular focus of the Westminster Government has been the provision of additional support for council tax payments. In response to Covid-19, the 11 March budget provided a separate £500 million “hardship fund” for English local authorities, designed to help them “support economically vulnerable people and households in their local area”⁹⁵ an average of £1.6 million per authority. Guidance subsequently sets out the Government’s “strong expectation” that authorities will use their “discretion” to reduce bills by £150 for all of those in receipt of local council tax support.⁹⁶

⁸⁸ Scottish Parliament deb 1 Apr 2020 col 54

⁸⁹ Scottish Parliament deb 1 Apr 2020 col 56

⁹⁰ Housing, Communities and Local Government Committee, ‘Local government finance and the 2019 Spending Review’ at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmcomloc/2036/203605.htm> [Accessed 10th May 2020].

⁹¹ See S. Graby & R. Homayoun, ‘The crisis of local authority funding and its implications for independent living for disabled people in the United Kingdom’ (2019) 34(2) *Disability & Society* 320.

⁹² Ministry of Housing, Communities & Local Government, ‘Government pledges extra £1.6 billion for councils’ at: <https://www.gov.uk/government/news/government-pledges-extra-16-billion-for-councils> [accessed 10th May 2020].

⁹³ £155 million for Scotland, £95 million for Wales and £50 million for Northern Ireland.

⁹⁴ Ministry of Housing, Communities & Local Government, ‘Coronavirus (COVID-19): emergency funding for local government’ at: <https://www.gov.uk/government/publications/covid-19-emergency-funding-for-local-government> [accessed 10th May 2020].

⁹⁵ Ministry of Housing, Communities & Local Government, ‘COVID-19 hardship fund 2020-21 – Local Authority Guidance’ at: <https://tinyurl.com/wrw723n> [accessed 10th May 2020].

⁹⁶ Ministry of Housing, Communities & Local Government, ‘COVID-19 hardship fund 2020-21 – Local Authority Guidance’ at: <https://tinyurl.com/wrw723n> [accessed 10th May 2020].

Appeals

Tribunals have been considerably impacted by the coronavirus. Both the First-tier Tribunal (Social Entitlement Chamber (SEC)) and the Upper Tribunal (UT) have ceased in-person oral hearings. Amendments to the procedure rules alter the framework for adjudication as emergency measures. The effectiveness of the processes followed will provide further evidence for the evaluation of remote access in courts and tribunals. The underlying rationale for these latest amendments, concerned with health protection, is completely legitimate, but there will nevertheless be justice and equality concerns about such departures from the traditional norm of an oral hearing, particularly in cases concerning disputes between citizens, often vulnerable and disempowered, and state agencies.

Both the First-tier Tribunal and the UT already had a power to direct that hearings be conducted via video or audio, but the Coronavirus Act 2020 has amended the Tribunals, Courts and Enforcement Act 2007 to give the relevant tribunal, in either case, the power to direct further that the proceedings be publicly broadcast and recorded (with various offences prescribed for unauthorised recording or transmission).⁹⁷ Other, arguably more fundamental (even if presented as short term) changes have been made by the Tribunal Procedure (Coronavirus) (Amendment) Rules 2020,⁹⁸ introducing two important new rules into the SEC procedural rules and also making a separate amendment.⁹⁹ New rule 5A gives the tribunal a further additional power to dispose of an appeal without a hearing, where “the matter is urgent”, a hearing (even via video or audio) would not be “reasonably practicable”, and “it is in the interests of justice to do so”. This power is stated to apply notwithstanding the tribunal’s existing duty to hold a hearing before making a decision disposing of proceedings, a duty which is otherwise applicable unless the parties have consented to, or not objected to, dispensing with a hearing and the tribunal considers it is able to decide the case without a hearing.¹⁰⁰ The tribunal also retains the power to dispose of the matter without a hearing when exercising its power to strike out a party’s case (for example, because it considers “there is no reasonable prospect of the appeal succeeding”).¹⁰¹ An amendment to r.30 of the SEC procedure rules adds to the tribunal’s discretion to dispense with the requirement that a hearing (or part of it) be in public.¹⁰²

⁹⁷ Tribunals, Courts and Enforcement Act 2007 ss 29ZA-29ZD, inserted by the Coronavirus Act 2020 s.55(b) and Sch 25 para.2. In force 25 March 2020.

⁹⁸ SI 2020/416.

⁹⁹ Tribunal Procedure (First-tier Tribunal) (Social Entitlement) Chamber) Rules 2008 (SI 2008/2685) (as amended).

¹⁰⁰ Tribunal Procedure (First-tier Tribunal) (Social Entitlement) Chamber) Rules 2008 (SI 2008/2685) (as amended), r.27(1). Note that this rule does not apply to decisions that concern reviews or permission to appeal to the Upper Tribunal: r.27(2).

¹⁰¹ Tribunal Procedure (First-tier Tribunal) (Social Entitlement) Chamber) Rules 2008 (SI 2008/2685) (as amended), r.8(3), read with r.27(3) and new r.5A(3).

¹⁰² Note that this requirement is not applicable in criminal injuries compensation cases, which must normally be held in private: r.30(2).

Under r.30 the tribunal has a power to direct that a hearing is in private.¹⁰³ The amendment to this rule¹⁰⁴ gives the tribunal a specific additional power to order that a hearing (or part of a hearing) be held in private if it directs that there should be a hearing (or part-hearing) via video or audio, it is not reasonably practical for non-parties to attend a hearing at a tribunal or court venue, it would not be possible for a media representative to access the hearing remotely while it is in progress, and such a direction is necessary to ensure “proper administration of justice”. A new rule provides that where a hearing is held in private following the exercise of this additional power, the proceedings must be recorded.¹⁰⁵

Scotland has a separate procedural framework for social security appeals, but many similarities with the requirements in England and Wales (including a presumption of a public hearing attended by the parties).¹⁰⁶ A separate (and somewhat broader) framework for tribunal cases to be dealt with via “electronic means” and without attendance in person is set out in the Coronavirus (Scotland) Act 2020.¹⁰⁷ The Coronavirus Act 2020 empowers courts and tribunals in Northern Ireland to hold hearings by live video or audio link on application by any person participating in the proceedings or of the court or tribunal’s own motion, on grounds including public health.¹⁰⁸ In practice, at the time of writing no oral hearings were taking place by any medium, although the Department for Justice stated that arrangements were in place to “deal with urgent cases remotely.”¹⁰⁹

General guidance to tribunal chambers by the Senior President of Tribunals on contingency arrangements in response to the pandemic, but issued prior to the lockdown,¹¹⁰ indicates that if the parties have not both agreed to dispense with an oral hearing a provisional decision based on the papers alone could be given to the parties and the parties would then have the option of agreeing to the decision being confirmed as binding. A hearing would be listed where there was not agreement with the decision. Separate chamber-specific guidance has since been issued, as discussed below.

¹⁰³ Tribunal Procedure (First-tier Tribunal) (Social Entitlement) Chamber) Rules 2008 (SI 2008/2685) (as amended), r.30(3).

¹⁰⁴ Tribunal Procedure (Coronavirus) (Amendment) Rules 2020 (SI 2020/416) r.4(3), inserting Tribunal Procedure (First-tier Tribunal) (Social Entitlement) Chamber) Rules 2008 (SI 2008/2685) (as amended), r.30(3A).

¹⁰⁵ Tribunal Procedure (First-tier Tribunal) (Social Entitlement) Chamber) Rules 2008 (SI 2008/2685) (as amended), r.30A, inserted by the Tribunal Procedure (Coronavirus) (Amendment) Rules 2020 (SI 2020/416) r.4(4). New r 30A also provides that the proceedings must also be recorded where the hearing falls to be treated as public only because a media representative is able to access remotely it while in progress.

¹⁰⁶ First-tier Tribunal for Scotland Social Security Tribunal (Procedure) Regulations 2018 (SSI 2018/273), as amended. See also the Upper Tribunal for Scotland (Social Security Rules of Procedure) Regulations 2018 (SSI 2018/274).

¹⁰⁷ Coronavirus (Scotland) Act 2020, Sch 4 part 1.

¹⁰⁸ Coronavirus Act 2020 c7 sch 27 part 1

¹⁰⁹ Department for Justice, ‘CORONAVIRUS (COVID-19) Court business continuity arrangements’ (Belfast: Department for Justice, 2020) <https://www.justice-ni.gov.uk/coronavirus-covid-19-court-business-continuity-arrangements>

¹¹⁰ Senior President of Tribunals, Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal (19 March 2020)

PIP appeals arising from termination of awards due to revision or supersession are likely to be considered urgent cases. Since a face to face hearing will not be possible, the judge will be expected to seek to make a decision on the papers (if favourable to the appellant) but otherwise could direct a remote telephone hearing. PIP cases are usually determined by a three person panel comprising a judge, medical member and disability member, but in accordance with a Practice Direction these cases can now be determined by a judge alone (which will be on a remote basis), although the judge can also select other members to decide the case with him or her or may seek advice from one or more non-legal members (provided the advice given is disclosed to the parties and recorded).¹¹¹

A general “stay” was applied to all UT (Administrative Appeals Chamber) (AAT) proceedings for 21 days via a General Direction issued by the Chamber President on 25 March 2020¹¹² (although the stay was lifted in at least one case given its special circumstances and in the interests of fairness and justice¹¹³). Equivalent amendments to those relating to the First-tier Tribunal, noted above, were also made to the UT procedural rules.¹¹⁴ Subsequent guidance issued by the AAC President in respect of both England & Wales and Scotland explains that in a case the judge will seek to ensure “the case is heard and decided in a just and fair way” and will decide how that is to be achieved without an oral hearing after contacting the parties with a view to finding out whether the case is suitable for video or telephone hearing, although may decide that the case can be determined on the papers alone.¹¹⁵ It is acknowledged that the Covid-19 pandemic has restricted UT appeals administration and that “delays” (Scotland) or “considerable delays” (England and Wales) in the determination of appeals are likely. All the SEC and UT rule amendments came into force on 10 April 2020 and, along with the changes made by the Coronavirus Act itself (in relation to broadcasting and transmission (above)) will run for two years unless terminated sooner.¹¹⁶

¹¹¹ Pilot Practice Direction: Panel Composition in the First-Tier Tribunal and the Upper Tribunal (19 March 2020) at <https://www.judiciary.uk/wp-content/uploads/2020/03/General-Panel-Composition-Pilot-Final-for-Publication-1.pdf>

¹¹² *Information and Directions for General Stay and General Extension of Time* (25 March 2020) (Dame Judith Farbey, Chamber President), available at <https://www.judiciary.uk/wp-content/uploads/2020/03/UTAAC-General-extension-stay-and-directions-25-March-2020.pdf> (The stay had the effect of putting cases on hold, apart from those where a remote hearing was already arranged with the Chamber.

¹¹³ See e.g. *PP v Secretary of State for Work and Pensions* [2020] UKUT 109 (AAC) at [47], per UTJ Wikeley..

¹¹⁴ Tribunal Procedure (Coronavirus) (Amendment) Rules 2020 (SI 2020/416) r.5, amending the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) (as amended), taking effect on 10 April 2020

¹¹⁵ Upper Tribunal Administrative Appeals Chamber, *Guidance for Users in England and Wales* (16 April 2020) at <https://www.judiciary.uk/wp-content/uploads/2020/04/UTAAC-Guidance-for-Users-in-England-and-Wales-16-04-2020.pdf> Upper Tribunal Administrative Appeals Chamber, *Guidance for Users in Scotland* (16 April 2020) at <https://www.judiciary.uk/wp-content/uploads/2020/04/UT-AAC-Guidance-for-Users-in-Scotland-16-04-2020.pdf>

¹¹⁶ Coronavirus Act 2020 ss 89(1) and 90 and the Tribunal Procedure (Coronavirus) (Amendment) Rules 2020 (SI 2020/416) r.1(2) .

Assessing the implications of these Covid-19 related developments

Increases in allowances and interaction with the benefit cap

An interesting feature of the changes to out-of-work benefits is the way in which, to a limited extent and after the five-week wait for a first UC payment, the social assistance system now privileges the freshly-unemployed over longer term claimants. In part this is because the increase in the level of the UC standard allowance is not mirrored in the equivalent elements of income-based JSA, income-based ESA or income support. Evidence to the Work and Pensions Committee suggests this distinction has been based on practical considerations rather than reflecting a deliberate decision to favour UC.¹¹⁷ Nonetheless, the outcome is that legacy benefit recipients – whose claims by definition will predate the roll-out of UC to their area – will typically have a maximum entitlement of about £20 per week less than those on UC.

A second factor favouring more recent claims, one that cuts across both the legacy benefits and UC, is the continued operation of the household benefit cap.¹¹⁸ New UC claimants whose earnings in each of the 12 months immediately prior to their claim were equivalent to at least 16 hours per week at the National Minimum Wage¹¹⁹ enjoy a “grace period” of nine months, during which the cap does not apply. This means that people who find themselves out of work due to coronavirus, or who left employment shortly before the pandemic, will benefit in full from the above-noted increases to the standard allowance and LHA (subject to the LHA cap in certain areas of London). The same applies to recipients of a disability benefit (PIP or DLA) or retirement pension, who been exempt from the cap since its inception. Longer-term claimants subject to the cap will likely see their income increase if they have no children, but many others will not.¹²⁰ To give the most extreme example, the notional benefit entitlement a lone parent with two children renting a three-bedroom property¹²¹ at or above the LHA for central or most of inner London *already* exceeded the cap by some £7,700 per year in 2019-20. Following the uplift, the potential loss due to the cap increases to £12,908.36. If the example claimant’s rent were equivalent to the maximum LHA (£441.86 per week) her weekly income after housing costs would be just £23.28. To put this into context, the destitution threshold for one adult and two children has

¹¹⁷ P Schofield in Work and Pensions Committee, ‘Oral evidence: The DWP’s response to the coronavirus outbreak (HC 178, London: House of Commons, 2020) Q33

¹¹⁸ Universal Credit Regulations 2013 (SI 2013/376) reg 82, as amended by Universal Credit (Benefit Cap Earnings Exception) Amendment Regulations 2017 (SI 2017/138) reg 2

¹¹⁹ Joint-claim couples’ combined earnings must meet the same threshold

¹²⁰ For a critique of the benefit cap and support for children in response to Covid-19, see J Bradshaw and F Bennett, ‘UK Government’s income measures in response to COVID-19’ (ESPN Flash Report 2020/30) at: <https://ec.europa.eu/social/BlobServlet?docId=22626&langId=en>

¹²¹ If the children are of different genders and at least one is aged 10 years or older then they are not expected to share a bedroom – Universal Credit Regulations 2013 (SI 2013/376) sch 4 para 10

been placed at £110 per week after housing costs.¹²² The cap is not simply a London problem; a lone parent with two children anywhere else in the UK who has an LHA (or social rent) higher than £146.18 per week would have an entitlement in excess of the cap and therefore would not receive the full benefit of the uplift. A two-bedroom property at the LHA for central Manchester or York, or a three-bedroom property at the LHA for Dundee, would take the claimant above the cap, while even in lower-cost areas like Newport or Teesside a couple with two children could be capped.¹²³

All parts of Northern Ireland fall at the lower end of the housing costs scale, but there too a couple with two children at the LHA for a three-bedroom property in Belfast, the North West (including Derry-Londonderry) or the South East (including Lisburn and Bangor) broad rental market areas would have an annual entitlement of more than £20,000.¹²⁴ Thanks to the effective disapplication of the benefit cap through a supplementary payment to affected households, all UC claimants there *will* receive the full benefit of the headline increase to the standard allowance and all private tenants on UC or HB claimants will benefit from the LHA uplift. Some social tenants in Northern Ireland will be still better off as their housing costs award mirrors their rent (rather than being capped at the LHA, which still only covers a minority of private lets in a broad rental market area) and, in contrast to Great Britain (and thanks to another supplementary payment), is almost never reduced due to under-occupancy.

In Great Britain, then, the way in which benefits have been increased in response to coronavirus means the system now treats those whose loss of employment results from the pandemic with greater generosity than it does those out of work for nine months or more. There has been no official indication that this flows from a policy decision to reward those with a recent record of contribution through paid work or to recognise this group as having more legitimate grounds for being out of work, but that is the effect in practice. Reinforcing this is the still more generous support available to employees placed on furlough, that is who remain technically employed but have been instructed by their employer to cease paid work for at least 21 days due to “circumstances arising as a result of coronavirus.”¹²⁵ Under the Coronavirus Jobs Retention Scheme, as currently operating, HMRC will reimburse employers up to the lower of 80% of a furloughed employee’s wages or £2,500 per

¹²² S Fitzpatrick, G Bramley, F Sosenko, J Blenkinsopp, J Wood, S Johnsen, M Littlewood and Beth Watts, *Destitution in the UK 2018* (York: Joseph Rowntree Foundation, 2018) <https://www.jrf.org.uk/report/destitution-uk-2018>

¹²³ For local housing allowances, see <https://www.gov.uk/government/publications/local-housing-allowance-lha-rates-applicable-from-april-2020-to-march-2021>, <https://www.gov.scot/publications/local-housing-allowance-rates-2020-2021/> and <https://gov.wales/local-housing-allowance-lha-rates>

¹²⁴ <https://www.nihe.gov.uk/Housing-Help/Local-Housing-Allowance/Current-LHA-rent-levels>

¹²⁵ Coronavirus Act 2020 Functions of Her Majesty’s Revenue and Customs (Coronavirus Job Retention Scheme) Direction para 6.1

month.¹²⁶ This kind of differentiation is unusual for the UK, where social assistance predominates in working age social protection. As is typical for the social assistance model, UC and the legacy benefits act as a means-tested social floor, albeit with slightly more generous treatment for most in-work claimants of UC. Those entitled to contributory JSA/ESA receive a very limited additional reward in that their headline rate of benefit is paid on a non-means tested basis for six months and conditionality is relaxed for three months, but the rate itself is the same as the personal/standard allowance for claimants on the means-tested track.¹²⁷ Increasing support for UC claimants means a higher level of social assistance to uncapped claimants. The freshly out-of-work will not be the sole beneficiaries, since claimants without children will have an entitlement below the level of the benefit cap, but among those with a higher entitlement, having a recent record of paid employment now appears to indicate greater deservingness. The temporarily laid-off are the big winners for now. Previously they would have had to claim JSA at the same rate as their unemployed counterparts (equivalent to £322 per month, albeit with the option of claiming UC on top of that depending on savings and total household income), so their maximum entitlement has increased dramatically in some cases. Conversely, those whose immigration status means they have no access to the social security system face a stark choice between working – whether formally or informally – or having no income at all.

What this might reveal about the future of social protection in the UK remains to be seen. Enhancing the importance of the contributory principle has consistently had its advocates from various parts of the political spectrum and from academia,¹²⁸ but outside retirement pensions its role has remained marginal. The Centre for Social Justice has suggested that withdrawal from the European Union presents a window of opportunity for reform. The current approach – hurriedly introduced as an emergency measure – seems unlikely to provide a model for a long-term solution, but by providing different levels of support (and by different means) for claimants in different circumstances it has some potential to act as a conversation-starter. Northern Ireland, of course, continues to operate a more traditional approach to social assistance, with a social floor based on household composition (subject to the two-child limit on UC) and housing costs (subject to the LHA for private tenants and

¹²⁶ Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction para 7.1

¹²⁷ For discussion, see G McKeever and M Simpson, 'Worlds of welfare collide: implementing a European unemployment benefit system in the UK' (2017) 19(1) *European Journal of Social Security* 21 (DOI: 10.1177/1388262717699457)

¹²⁸ D O'Leary, *Something for something: restoring a contributory principle to the welfare state* (London: Demos, 2013) http://www.demos.co.uk/files/Something_For_Something_-_DuncanOLeary.pdf; P Saunders, *Beyond Beveridge: restoring the contributory principle to retirement pensions and welfare benefits* (London: Civitas, 2013) <https://www.civitas.org.uk/content/files/BeyondBeveridge.pdf>; K Lawton, G Cooke and N Pearce, *The condition of Britain: strategies for social renewal* (London: IPPR, 2014) https://www.ippr.org/files/publications/pdf/the-condition-of-britain_June2014.pdf; Centre for Social Justice, *Reforming contributory benefits: roundtable report* (London: CSJ, 2016) <https://www.centreforsocialjustice.org.uk/core/wp-content/uploads/2016/12/161206-Contributory-Benefits.pdf>

with limited support for owner occupiers). Prior to the referendum on independence, Scotland's expert working group on welfare explored various alternatives to the UK's liberal welfare state model.¹²⁹ At present Holyrood lacks the necessary devolved powers to take a radically different tack from the rest of the UK, but nonetheless the Scottish Government has, where possible, sought to distinguish itself from the DWP approach in rhetoric, policy and practice.¹³⁰ The ongoing pilot of universal basic income perhaps hints at a greater appetite for a universalist, social democratic approach to social protection than a contribution-focused, conservative model.¹³¹ If the UK Government were to lurch towards the conservative model, this would raise questions about whether the devolved administrations would embrace this change of philosophy, and about whether they would have the necessary competences, fiscal resources and IT infrastructure to opt for a different pathway if they preferred. What can be more confidently stated is that the coronavirus response serves up a further case study of the tensions that arise from social security devolution in an asymmetric constitutional settlement in which one government clearly sets the agenda for the state as a whole.¹³²

A more immediate effect of this increase in generosity, however patchy, is to enhance the appeal of UC to uncapped claimants in comparison to the legacy system. Consequently, assuming claimants realise they would be better off on UC, it is possible that the current surge in fresh claims will be augmented by a wave of applications to voluntarily migrate to the new benefit. The authors are not aware of any official statement that this results from a deliberate decision to take the present circumstances as an opportunity to speed the hitherto glacial roll-out of UC. Indeed, evidence to the Work and Pensions Committee suggests the main consideration was that the rise could be implemented faster for UC than for the legacy benefits.¹³³ If a dash to switch is an unintended consequence, it could prove an unwelcome one given that the DWP had been in the process of redeploying thousands of staff to cope with the volume of new claims even before the announcement of the increased standard allowance.¹³⁴ A group at immediate risk of disadvantage due to a premature claim to UC comprises those who were in receipt of tax credits and who have made a voluntary application to UC due to, for example, an immediate loss of income from

¹²⁹ Expert Working Group on Welfare, *Re-thinking welfare: fair, personal and simple* (Edinburgh: Scottish Parliament, 2016) <https://www2.gov.scot/Topics/People/fairerscotland/EXPERTWORKINGGROUPONWELFARE>

¹³⁰ M Simpson, G McKeever and AM Gray, 'From principles to practice: social security in the Scottish laboratory of democracy' (2019) 26(1) *Journal of Social Security Law* 13

¹³¹ For an overview of universalism in the UK welfare state, and a contrast with models pursued in Nordic countries, see A Anttonen and J Sipilä, 'Universalism in the British and Scandinavian social policy debates', in A Anttonen, L Haikio, and K Stefansson (eds), *Welfare State, Universalism and Diversity* (Edward Elgar 2012) 22-27; see also G Esping-Andersen, *The three worlds of welfare capitalism* (Princeton: Princeton University Press, 1990)

¹³² See M Simpson, 'Renegotiating social citizenship in the age of devolution' (2017) 44(4) *Journal of Law and Society* 646 (DOI: 10.1111/jols.12061)

¹³³ P Schofield in Work and Pensions Committee, 'Oral evidence: The DWP's response to the coronavirus outbreak (HC 178, London: House of Commons, 2020) Q33

¹³⁴ T Coffey and P Schofield in Work and Pensions Committee, 'Oral evidence: The DWP's response to the coronavirus outbreak (HC 178, London: House of Commons, 25 March 2020) Q33

employment. In some cases, such claimants are not aware that their existing claim to tax credit will end; and that they will not be able to re-establish a new tax credit claim.¹³⁵ Recent research with UC claimants in Northern Ireland shows some departmental staff lacked knowledge of the benefit in the months following its introduction there,¹³⁶ and there is a real risk that this problem will rear its head again if new claims are being dealt with by staff with little experience of the benefit. Early findings from the Work and Pensions Committee show some overlap with those from the Northern Ireland study, with praise for some individual staff members sitting alongside complaints about others and about the system, including long delays when seeking information, digital exclusion and confusion about how to make an application, or indeed what to apply for.¹³⁷

Jobseeking conditionality

One of the most striking Covid-19 related reforms, the suspension of jobseeking conditionality, seemingly in recognition of the added difficulty many claimants currently face in returning to the labour market, is in marked contrast to the aftermath of the 2008 financial crisis. Then, sanctioning rates for JSA claimants appeared to reflect an ‘individual responsibility’ rather than a ‘structural factors’ explanation for unemployment. It is well known that the proportion of JSA claimants in Great Britain sanctioned, already on an upward trend since the end of 2008, jumped sharply after the Coalition Government took office in 2010,¹³⁸ with disadvantaged groups facing particular barriers to labour market engagement the most affected.¹³⁹ The relaxing of conditionality rules may indicate greater acceptance at present that, outside specific sectors, opportunity is limited. It is worth noting that a similar level of understanding has not been evident in the rhetoric of some non-UK leaders, with the Governor of New York suggesting that anyone dissatisfied with the economic impact of lockdown could and should “go take a job as an essential worker.”¹⁴⁰ Equally, the fact that the benefit cap – one of the chief justifications for which has been its role in enhancing work incentives – has not been increased despite the likelihood that its effectiveness in this regard is likely to be even more limited than under normal

¹³⁵ Art 2 of The Welfare Reform Act 2012 (Commencement No. 32 and Savings and Transitional Provisions) Order 2019 commences section 33(1)(f) of the Welfare Reform Act 2012 (c. 5), which abolishes child tax credit and working tax credit and repeals of Part 1 of the Tax Credits Act 2002.

¹³⁶ R Patrick and M Simpson with UC:Us, *Universal credit in Northern Ireland: sharing experiences, suggesting changes* (York: Joseph Rowntree Foundation, 2020)

¹³⁷ Work and Pensions Committee, *What we learned from our survey into people’s experiences of the benefits system during the coronavirus outbreak* (London: House of Commons, 2020) <https://www.parliament.uk/business/committees/committees-a-z/commons-select/work-and-pensions-committee/news-parliament-2017/response-to-coronavirus-survey-results-chairs-comments-19-21/>

¹³⁸ D Eiser and M Brewer, ‘Fact check: do job centres have a target for benefit sanctions?’ (The Conversation, 6 May 2015) <https://theconversation.com/fact-check-do-job-centres-have-a-target-for-benefit-sanctions-41212>

¹³⁹ B Watts, S Fitzpatrick, G Bramley, D Watkins and Welfare Conditionality team, *Welfare sanctions and conditionality in the UK* (York: JRF, 2014) <https://www.jrf.org.uk/report/welfare-sanctions-and-conditionality-uk>

¹⁴⁰ A Cuomo on ABC News, 22 April 2020 <https://youtu.be/biorRAQJhH8>

circumstances,¹⁴¹ may suggest the UK's position has only softened to some extent. Given the temporary nature of the changes to conditionality and uncertainty around how long recruitment plans will remain on hold even as a measure of 'normality' begins to return, it will be interesting to see how long the UK's altered approach endures, and how sympathetic work coaches and decision makers prove to be once jobseeking obligations are formally restored. Comments from Amber Rudd during her brief tenure as Secretary of State for Work and Pensions¹⁴² and the recent downward trend in sanctioning¹⁴³ suggested a window was opening for a rethink of recent approaches, but it would be premature to suggest that coronavirus might hasten any such process.

Access to benefits for people with disabilities

Many of those who are currently unable to work due to the coronavirus will have underlying health conditions and may be engaging with the complexities of the social security system for the first time.¹⁴⁴ Applying for disability or incapacity benefits (PIP and the Limited Capability for Work Related Activity (LCWRA) top-up to UC) is particularly complicated due to the burden of proving eligibility through the provision of detailed written evidence about "how your disability affects you" (PIP 2 form) and participating in a subsequent disability assessment. There have, as noted above, been extension measures in response to the pandemic, for existing claimants.¹⁴⁵ However, The Child Poverty Action Group has reported that this commitment is not being upheld for those claimants who have had their PIP awarded by a tribunal.¹⁴⁶ This is particularly concerning as statistics reveal the significant proportion of decisions overturned at appeal stage in England and Wales.¹⁴⁷

New claimants must meet the threshold required to access disability benefits. Face-to-face assessments for disability benefits have been put on hold for three months and all

¹⁴¹ C Emmerson and R Joyce, 'If the cap doesn't fit?' (IFS Observation, 7 April 2020) <https://www.ifs.org.uk/publications/14794>

¹⁴² A Rudd, 'The future of the labour market' (speech to Recruitment and Employment Federation, 9 May 2019) <https://www.gov.uk/government/speeches/the-future-of-the-labour-market>

¹⁴³ D Webster, 'Briefing: benefit sanctions statistics, February 2020' (Glasgow: University of Glasgow, 2020)

¹⁴⁴ Work and Pensions Committee, Inquiry on DWP Response to the Coronavirus, *Written Evidence from Child Poverty Action Group* (CPAG) <<https://committees.parliament.uk/writtenevidence/1734/html/>> accessed 6 May 2020; *Written Evidence from Parkinson's UK* <<https://committees.parliament.uk/writtenevidence/2181/html/>> accessed 6 May 2020.

¹⁴⁵ See also DWP, 'Coronavirus update - benefit reviews and reassessments suspended' 23 March 2020 <<https://www.gov.uk/government/news/coronavirus-update-benefit-reviews-and-reassessments-suspended>> (accessed 5 May 2020); DWP, 'Claimants are asked to apply online as jobcentres limit access' 23 March 2020 <<https://www.gov.uk/government/news/claimants-are-asked-to-apply-online-as-jobcentres-limit-access>> (accessed 5 May 2020)

¹⁴⁶ Child Poverty Action Group, Early Warning System 'Mind the Gaps: Reporting on Families' Incomes During the Pandemic' (7 May 2020) <https://cpag.org.uk/sites/default/files/files/policypost/CPAG-mind-the-gaps-briefing-7-May.pdf> (accessed 8 May 2020)

¹⁴⁷ Ministry of Justice, Tribunal Statistics Quarterly, October to December 2019 (Provisional), (12 March 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/877060/Tribunal_and_GRC_statistics_Q3_201920.pdf> (accessed 8 May 2020). Statistics show a 76% success rate for claimants at PIP tribunal (approximately 26,100 cases).

appointments at benefits offices and job centres have been suspended. New PIP applications are being processed and assessment providers (Capita, Maximum or Atos) are making arrangements to carry out assessments for both PIP and the LCWRA element of UC by telephone or by carrying out a paper based review of evidence.¹⁴⁸ These alternative arrangements, introduced in haste due to the coronavirus, have created uncertainty¹⁴⁹ and may disadvantage existing claimants and new claimants in a number of ways. Some charities have highlighted a longer waiting time for communication from DWP as staff have been redeployed to process new UC claims – as a result many claimants who had applied for support just before the pandemic started have been left in limbo.¹⁵⁰ There is likely to be a consequent delay in assessments and decisions (including Mandatory Reconsiderations) as new remote processes are established, which will further compound financial difficulties for those households who need additional support to offset the additional cost associated with having a disability.¹⁵¹

Accessing high quality advice and support with the application, assessment and appeals process has proven to increase claimant access to financial support from the social security system,¹⁵² however accessing advice has immediately become more difficult as overall advice capacity has reduced (due to illness and other Covid-19 related issues) and organisations adjust to operating from remote environments. New disability claimants will face the added responsibility of collating evidence and seeking medical records or detailed statements from their GP/other medical professional, again, another task which will be problematic when clinical resources are focused on contending with the coronavirus. Those who are applying for contribution based “New Style ESA” are also required to access fit notes from their GP, or now, where relevant an “isolation note” via NHS 111, as noted above. More limited access to medical professionals is particularly concerning for those with

¹⁴⁸ DWP, ‘Face-to-face health assessments for benefits suspended amid coronavirus outbreak’ (16 March 2020) < <https://www.gov.uk/government/news/face-to-face-health-assessments-for-benefits-suspended-amid-coronavirus-outbreak> > (accessed 6 May 2020)

¹⁴⁹ Work and Pensions Committee, *What we learned from our survey into people’s experiences of the benefits system during the coronavirus outbreak* (London: House of Commons, 2020)

<https://www.parliament.uk/business/committees/committees-a-z/commons-select/work-and-pensions-committee/news-parliament-2017/response-to-coronavirus-survey-results-chairs-comments-19-21/>

¹⁵⁰ Work and Pensions Committee, Inquiry on DWP Response to the Coronavirus, *Written Evidence from CPAG and Parkinson’s UK*, above n. 130; see also *Written Evidence from Geoff Fimster (Disability Consultative Forum)* < <https://committees.parliament.uk/writtenevidence/1646/html/> > ; *Written Evidence from Joseph Rowntree Foundation* < <https://committees.parliament.uk/writtenevidence/1662/html/> > (accessed 5 May 2020)

¹⁵¹

Work and Pensions Committee, Inquiry on DWP Response to the Coronavirus, *Written Evidence from CPAG and Parkinson’s UK*, above n. 130; see also *Written Evidence from Geoff Fimster (Disability Consultative Forum)* < <https://committees.parliament.uk/writtenevidence/1646/html/> > ; *Written Evidence from Joseph Rowntree Foundation* < <https://committees.parliament.uk/writtenevidence/1662/html/> > (accessed 5 May 2020)

; The charity scope has found that disabled people face an average additional cost of £583 per month, see, Evan John, Greg Thomas and Anel Touchet, ‘The Disability Price Tag 2019 Policy Report’ (February 2019) < <https://www.scope.org.uk/campaigns/extra-costs/disability-price-tag/> > (accessed 6 May 2020)

¹⁵² Grainne McKeever, Mark Simpson and Ciara Fitzpatrick, ‘Destitution and Paths to Justice’ (LEF/JRF, 2018) <https://www.jrf.org.uk/report/destitution-and-paths-justice> (accessed 8 May 2020)

terminal illnesses, who under current Special Rules for Terminal Illness are required to submit a DS500 form signed by an appropriate clinician. In evidence to the Work and Pensions Committee, the MND Association said that despite communication with DWP on the issue they remained unclear on whether easements around producing evidence for Special Rules requirements had been introduced and were therefore struggling to give accurate advice to service users.¹⁵³

It is too early to assess the impact of the replacement of face-to-face assessments with telephone assessments or paper based reviews. However, difficulties accessing advice coupled with barriers in gathering medical evidence will have an overall impact on the claimant's ability to communicate the extent of their condition on paper which might prejudice the decision maker's conclusion if carrying out a paper based review. Macmillan and CAB Scotland have recommended reinstating 'implicit consent' to provider advisors with the ability to submit the PIP 2 form and additional evidence on behalf of a claimant.¹⁵⁴

The Scottish Government has a long standing commitment to reduce the number of face-to-face assessments carried out for the purposes of awarding disability benefits.¹⁵⁵ Disability Assistance, which will replace DLA for children, PIP and attendance allowance, will provide a choice of application channels including online, telephone, paper forms and in-person alongside the provision of detailed guidance in order to minimise the need for face-to-face assessment. In addition, the responsibility for collecting evidence will lie a social security case manager, who will contact the claimant's clinicians to develop a picture of how their condition affects them.¹⁵⁶ As detailed above, the coronavirus crisis has resulted in the Scottish Government delaying its proposed new disability benefits system.¹⁵⁷ There is scope in the context of the current crisis, for the UK Government to consider the evidence underpinning the Scottish approach and to implement a more holistic approach to disability assessments by prioritising written evidence and resorting to telephoning the claimant to fill

¹⁵³ Work and Pensions Committee, Inquiry on DWP Response to the Coronavirus, *Written Evidence from MND Association* < <https://committees.parliament.uk/writtenevidence/1715/html/>> (accessed 6 May); *Written Evidence from Macmillan Cancer Support* <<https://committees.parliament.uk/writtenevidence/1674/html/>> (accessed 6 May).

¹⁵⁴ *Written Evidence from Macmillan Cancer Support* <<https://committees.parliament.uk/writtenevidence/1674/html/>> (accessed 6 May). See also Work and Pensions Committee, Inquiry on DWP Response to the Coronavirus, *Written Evidence from Citizens Advice Scotland* <<https://committees.parliament.uk/writtenevidence/1677/html/>> (accessed 6 May 2020)

¹⁵⁵ Social Security (Scotland) Act 2018 (s. 55).

¹⁵⁶ Scottish Government Position Paper, *Disability Assistance: Assessments* (February 2019) < <https://www.gov.scot/publications/disability-assistance-assessments-policy-position-paper/> > (accessed 6 May 2020)

¹⁵⁷ Scottish Government, 'Update on devolved benefits' (1 April 2020) <<https://www.gov.scot/news/update-on-devolved-benefits/>>

in any information gaps, rather than a system that requires the adoption of a single assessment route (paper based or telephone)¹⁵⁸.

With the potential for a significant backlog of disability claims, the UK Government may pursue an intensification of its use of algorithmic decision making as a way to compensate for reduced capacity across the sections of DWP that deal with disability benefits. The Government has committed to bringing together the Work Capability Assessment (WCA) for ESA and UC, and the PIP assessment, into one integrated service from 2021.¹⁵⁹ DWP has stated that they are designing “a single digital platform” which will provide for an “integrated approach” across these benefits resulting in a “strategic transformation” to the service.¹⁶⁰ The UN Rapporteur for Extreme Poverty, Philip Alston, recently stated that

“systems of social protection and assistance are increasingly driven by digital data and technologies that are used to automate, predict, identify, surveil, detect, target and punish. The process is commonly referred to as ‘digital transformation’, but this somewhat neutral term should not be permitted to conceal the revolutionary, politically driven character of many such innovations”.¹⁶¹

In his report to the UN, Alston pointed out that these developments often slip under the radar as the “welfare community has tended to see the technological dimensions as separate from policy developments, rather than as being integrally linked.”¹⁶² It will be important to be alert to the potential human rights implications if the Government proceeds with integrating an “electronic question and answer process” that will according to Alston, “inevitably puts already vulnerable individuals at even greater disadvantage.”¹⁶³

¹⁵⁸ The Scottish Government has worked with “Experience Panels” and a Disability and Carers’ Benefits Expert Advisory Group to shape its new approach. The Government also ran a consultation on Disability Assistance which ran from 5 March 2019 – 28 May 2019. See; Scottish Government, above n. 141; Scottish Government, ‘Social Security Experience Panels: Annual Report 2019 (December 2019)

<https://www.gov.scot/publications/social-security-experience-panels-annual-report-2019/> (accessed 7 May 2020); Scottish Government, Disability and Carers Expert Advisory Group, “Overview”

<https://www.gov.scot/groups/disability-carers-benefits-expert-advisory-group/> (accessed 7 May 2020);

Scottish Government, ‘Social Security: A Consultation on Disability Assistance in Scotland’ (March 2019) ≤

<https://consult.gov.scot/social-security/improving-disability-assistance/> (accessed 7 May 2020)

¹⁵⁹ DWP, ‘Next step for new service for benefit assessments announced’ (2 March 2020)

<https://www.gov.uk/government/news/next-step-for-new-service-for-benefit-assessments-announced> (accessed 7 May 2020)

¹⁶⁰ Amber Rudd (previously Secretary of State for Work and Pensions). Health and Disability Announcement: Written statement - HCWS1376 (5 March 2019) < <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2019-03-05/HCWS1376/> (accessed 6 May 2020)

¹⁶¹ Report of the Special Rapporteur on Extreme Poverty and Human Rights 11 October 2019, UN A/74/493, para 3.

¹⁶² Report of the Special Rapporteur on Extreme Poverty and Human Rights 11 October 2019, UN A/74/493, para 7.

¹⁶³ Report of the Special Rapporteur on Extreme Poverty and Human Rights 11 October 2019, UN A/74/493, para 54.

Digital exclusion

Coronavirus has led to an increased reliance on online claiming arrangements; indeed, it lies behind the recent extension of electronic claiming to state pension credit in Great Britain.¹⁶⁴ However, the digitally excluded represent a significant group of people who are likely to be having acute difficulties getting access to benefits during this time. It is extremely difficult to quantify how many people are unable to access financial support and advice due to their inability to access the internet because they lack equipment, a connection or necessary online skills.¹⁶⁵ For this reason, it should not be assumed that new claimants will be able to manage an online claim, particularly given the need to complete all the relevant online stages, no matter how challenging they may seem, before a claim can be treated for legal purposes as having been made.¹⁶⁶ In the *Universal Credit Full Service Survey* published by the DWP in June 2018, 30% of claimants reported finding the registering of an online claim difficult – 38% in the case of claimants with a long-term health condition – and 25% were not able to submit an online claim, mostly due to difficulties in using or accessing either computers or the internet.¹⁶⁷ CAB Scotland point to the high volume of calls to the DWP (almost 6 million from 23-27 March 2020)¹⁶⁸ as an indication of the numerous issues that claimants are facing in making new claims.¹⁶⁹ A recent press Freedom of Information request revealed that 22% of UC online applicants between December 2016 – December 2018 said they had had help in making their claim via the digital form.¹⁷⁰ In a recent baseline survey carried out by the Department for Communities in Northern Ireland 60% of respondents said that “they would need help or support” to make a claim online, with 44%

¹⁶⁴ State Pension Credit (Coronavirus) (Electronic Claims) (Amendment) Regulations 2020 (SI 2020/456), amending the Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968). Claims for this credit can also be made by post or telephone, as previously.

¹⁶⁵ “The digitally disadvantaged”, in Lloyds Bank, UK Consumer Digital Index 2019 – Key Findings (London, 2019) The report revealed that 22% of the population did not have the digital skills required for day to day life.

¹⁶⁶ See *GDC v Secretary of State for Work and Pensions* [2020] UKUT 108 (AAC) (UTJ Wikeley).

¹⁶⁷ DWP, *Universal Credit Full Service Survey* (June 2018), paras 1.3.1, 4.1.2 and 4.1.3.. at . https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/714842/universal-credit-full-service-claimant-survey.pdf

¹⁶⁸ Letter from Permanent Secretary of DWP, Peter Schofield CB to Chair of the Work and Pensions Committee, Stephen Timms MP (3 April 2020) <<https://publications.parliament.uk/pa/cm5801/cmselect/cmworpen/correspondence/Letter-from-Peter-Schofield.pdf>> (accessed 8 May 2020). More recent correspondence from DWP to the Committee for Work and Pensions has pointed out that their “don’t call us, we’ll call you” campaign has successfully reduced the number of inbound calls to DWP. See; Letter from Permanent Secretary of DWP, Peter Schofield CB to Chair of the Work and Pensions Committee, Stephen Timms MP (21 April 2020) <<https://publications.parliament.uk/pa/cm5801/cmselect/cmworpen/correspondence/Letter-from-Peter-Schofield.pdf>> (accessed 8 May 2020)

¹⁶⁹ *Citizens Advice Scotland* <<https://committees.parliament.uk/writtenevidence/1677/html/>> (accessed 6 May 2020)

¹⁷⁰ Emma Youle, ‘Digital Exclusion’: 470,000 Need Help To Apply For Online-Only Universal Credit’ (HuffPost, 2 February 2019) https://www.huffingtonpost.co.uk/entry/universal-credit-online-only-help-apply_uk (accessed 8 May 2020)

stating that they would not be prepared to make an online application. Furthermore, 27% of respondents said that “did not use the internet at all”.¹⁷¹

All this highlights the potential that many UC claims will not be made, or will be delayed due to digital restrictions faced by many claimants. The lack of access to an adequate internet connection is particularly prohibitive in the context of the current pandemic and will acutely affect those who are in extreme poverty or who are destitute and are unable to access public facilities from where they can make and manage a claim.¹⁷² Furthermore, it will have a detrimental impact on those who require legal advice and support, as lack of internet access and current social distancing requirements will create substantial barriers for advisers and legal practitioners to access and lodge required documentation.¹⁷³ The right to social security¹⁷⁴ includes the right to access and maintain benefits on a basis of equality, but the “digital by default” approach in the UK can make it impossible or very difficult for some individuals to access that right.¹⁷⁵

Appeals

Problems of digital exclusion are not confined to claims processes, they also bite on appeals.¹⁷⁶ As noted above, HMCTS has responded by significantly accelerating the use of online and video hearings. This is likely to have three key impacts. First is the likely increase in litigants in person trying to navigate these online systems without access to advice. In data collected just prior to the pandemic, the social welfare advice sector was already under a huge demand for assistance digital assistance, with 35-50% of their users likely to need support in accessing a digital justice system.¹⁷⁷ Second, online hearings – now accounting for 90% of HMCTS activity¹⁷⁸ – may pose inherent disadvantages for some forms of appeals,

¹⁷¹ Department for Communities, Welfare Reform (NI) Claimant Baseline Surveys Report (January 2019) <https://www.communities-ni.gov.uk/system/files/publications/communities/wr-claimant-baseline-surveys-jan19.pdf> (accessed 8 May 2020)

¹⁷² JRF estimated that 1.5 million people in the UK were destitute IN 2018. See; Suzanne Fitzpatrick, Glen Bramley, Filip Sosenko, Janice Blenkinsopp, Jenny Wood, Sarah Johnsen, Mandy Littlewood, Beth Watts, ‘Destitution in the UK 2018’ (JRF, 2018) <https://www.jrf.org.uk/file/51558/download?token=SasLBzPB&filetype=full-report> (accessed 8 May 2020)

¹⁷³ Grainne McKeever, Mark Simpson and Ciara Fitzpatrick, ‘Destitution and Paths to Justice’ (LEF/JRF, 2018) <https://www.jrf.org.uk/report/destitution-and-paths-justice> (accessed 8 May 2020)

¹⁷⁴ International Covenant on Economic, Social and Cultural Rights, art. 9

¹⁷⁵ Report of the Special Rapporteur on Extreme Poverty and Human Rights 11 October 2019, UN A/74/493. See also; Committee on Economic, Social and Cultural Rights, general comment No. 19 (2007) on the right to social security, para. 2 and paras. 24–27

¹⁷⁶ R. Thomas & J. Tomlinson, ‘Remodelling social security appeals (again): the advent of online tribunals’ (2018) 25(2) J.S.S.L 84-101.

¹⁷⁷ Administrative Justice Council, ‘Digitisation and Accessing Justice in the Community’ (2020) at: <https://ajc-justice.co.uk/wp-content/uploads/2020/04/Digitisation.pdf> [accessed 10th May 2020].

¹⁷⁸

HM Courts & Tribunals Service, ‘Guidance: Courts and tribunals data on audio and video technology use during coronavirus outbreak’ at: <https://www.gov.uk/guidance/courts-and-tribunals-data-on-audio-and-video-technology-use-during-coronavirus-outbreak> [accessed 10th May 2020].

particularly those with a “medical element”.¹⁷⁹ An interim report by the Equality and Human Rights Commission underscores that making reasonable adjustments for those with cognitive impairments, mental health conditions and/or neurodiverse conditions is often impossible in an online format.¹⁸⁰ Problems in accessing online hearings may in turn lead more to opt for paper hearings, which have been shown to have a lower success rate.¹⁸¹ These problems are not temporary. This shift to online processes was already in motion,¹⁸² and the pandemic has accelerated digitalisation.

In terms of mandatory reconsideration (MR) processes, recent problems identified by the CPAG’s “Early Warning System” are only likely to be exacerbated by the vastly increased demand that is in the pipeline. Delays in the scanning, uploading and allocation of documents to decision-makers, or repeated MR requests going ignored until complaints are triggered are likely to worsen as caseloads increase.¹⁸³ Currently, data for clearance times and registration of MRs are only available until January 2020,¹⁸⁴ so it is too early to tell the full impact on internal review processes, but it seems inevitable that they will come under significant strain and have procedural justice implications.

Conclusion

This article represents an initial, very early appraisal of the UK’s social security response to the coronavirus pandemic. The first part of the article illustrates the scale of the intervention that has occurred. What is less clear is what the longer-term effect on policy in this area might be, but it seems likely to far outstrip those changes we have detailed and critiqued above. Our primary arguments – on the perversity of the ongoing benefit cap, problems in accessing much needed support, the need to address digital exclusion, and the gaps that should be filled – need addressing to ensure that the social security system can fulfil its purpose throughout this crisis. Looking forward, however, there are significant broader challenges to be faced.

¹⁷⁹ R. Thomas & J. Tomlinson, ‘Remodelling social security appeals (again): the advent of online tribunals’ (2018) 25(2) J.S.S.L 84-101.

¹⁸⁰ Equality & Human Rights Commission, ‘Inclusive justice: a system designed for all: Interim evidence report’ (2020) at: <https://tinyurl.com/ycxqgc2s> [accessed 10th May 2020].

¹⁸¹ See Nuffield Foundation, ‘Understanding tribunal decision-making’ (2013) at <https://tinyurl.com/y8ehmu23> [accessed 10th May 2020] as cited in Work & Pensions Select Committee, ‘Written evidence from Ciara Fitzpatrick, Gráinne McKeever, Ruth Patrick and Mark Simpson’ (2020) at: <https://committees.parliament.uk/writtenevidence/1678/pdf/> [accessed 10th May 2020].

¹⁸² See J. Tomlinson, *Justice in the Digital State* (Policy Press, 2019).

¹⁸³ Child Poverty Action Group, ‘Early Warning System E-bulletin – February 2020’ at: <https://cpag.org.uk/welfare-rights/resources/e-bulletins/early-warning-system-e-bulletin-february-2020> [accessed 10th May 2020].

¹⁸⁴ DWP, Stat-Xplore, at: stat-xplore.dwp.gov.uk [accessed 10th May 2020].

First, we are entering – or are already in – a significant economic recession.¹⁸⁵ The austerity measures of the previous Coalition and Conservative Westminster Governments fell heavily upon the UK social security system. Welfare austerity can and does lead to “penury, punishment and destitution” for some of the poorest in society.¹⁸⁶ The political reaction to recession and the implications for social security provision remain to be seen, but social security researchers, practitioners and recipients will be acutely aware of the consequences of a return or acceleration of reductions to support. More optimistically, while a “magic money tree”¹⁸⁷ has not been discovered at Caxton House, a Government that has from the outset taken a different view of public spending to its recent predecessors¹⁸⁸ has embraced the role of the state in supporting both household incomes and the economy at large – a transformation sufficiently profound for some to speculate that this crisis is not merely an opportunity for a paradigm shift, but demands one.¹⁸⁹

Caveats and shortcomings abound. In particular, the retention of the benefit cap at a level that plainly causes destitution belies any notion that residualism is dead. Our second observation, then, is the emergence of a “two-tier claimant hierarchy” in the Government’s current response, where those losing paid employment are situated as more “deserving” than those not recently employed. The unpicking of time-limited measures like the increased UC standard allowance may or may not prove politically feasible, but in either case social security researchers should be mindful of the potential for these narratives to gain more traction in the “new normal”. To entrench the preferential treatment of the recently out-of-work in line with the conservative welfare state model – which typically offers significantly higher benefits to claimants with a recent record of social insurance contribution, for a limited period – would be a radical departure indeed, but a rare window of opportunity to have this kind of conversation could be opening.

Third, questions of process will demand as much attention as questions of policy. Notably, the crisis has required an immediate and widespread digitisation of social security applications, administration and appeals. This is a path that the benefit administration was already on¹⁹⁰ – the jury is out on how UC systems, already well known to have misfired at

¹⁸⁵ *Financial Times*, ‘Bank of England warns UK set to enter worst recession for 300 years’ (7 May 2020) at: <https://tinyurl.com/yamfk52m> [accessed 12th May 2020].

¹⁸⁶ D Edmiston, *Welfare, inequality and social citizenship: Deprivation and affluence in austerity Britain* (Policy Press, 2018) 2.

¹⁸⁷ L Dearden, ‘Theresa May prompts anger after telling nurse who hasn’t had pay rise for eight years: “There’s no magic money tree”’ (Independent, 3 June 2017) <https://www.independent.co.uk/news/uk/politics/theresa-may-nurse-magic-money-tree-bbcqt-question-time-pay-rise-eight-years-election-latest-a7770576.html>

¹⁸⁸ L Elliott, ‘Osbornomics is dead: just ask Jeremy Hunt and Boris Johnson’ (Guardian, 11 July 2019) <https://www.theguardian.com/commentisfree/2019/jul/11/osbornomics-dead-ask-boris-johnson-jeremy-hunt>

¹⁸⁹ L Elliott, ‘The coronavirus crisis may lead to a new way of economic thinking’ (Guardian, 22 March 2020) <https://www.theguardian.com/business/2020/mar/22/the-coronavirus-is-leading-to-a-whole-new-way-of-economic-thinking>

¹⁹⁰ See J. Tomlinson, *Justice in the Digital State* (Policy Press, 2019).

times,¹⁹¹ are coping with a surge in applicant numbers – but Covid-19 will likely serve as a catalyst for greater use of online systems once the pandemic subsides. There are challenges and opportunities. We refer above to the danger of “digital exclusion” and underscore the potential disadvantages for certain claimants – especially those requiring the assessment of medical evidence – in online appeals. Likewise, the social welfare advice sector on which so many are reliant is currently insufficiently funded and ill-equipped to deal with the challenges posed by rapidly increasing digitisation.¹⁹² On the other hand, for some time, the Scottish Government’s position has been that face-to-face assessments of disability are only rarely necessary. If the DWP finds itself capable of managing without them, it might struggle to justify a return to processes that claimants have described as “humiliating” and “degrading.”¹⁹³ Conversely, if there is evidence that claimants have been disadvantaged by the change then the Scottish Government will come under pressure to explain what steps it is taking to avoid similar problems.

The situation remains fluid, but it is clear that Covid-19, as both a public health emergency and the cause of a major economic shock, is having a profound impact on social security but over time will surely precipitate a more profound policy debate about how the level of social protection the system provides can be maintained on an appropriate level and on a permanent basis.

¹⁹¹ Comptroller and Auditor General, *Rolling out Universal Credit* (HC 1123, London: National Audit Office, 2018) <https://www.nao.org.uk/report/rolling-out-universal-credit/>

¹⁹² See Administrative Justice Council, ‘Digitisation and Accessing Justice in the Community’ (2020) at: <https://ajc-justice.co.uk/wp-content/uploads/2020/04/Digitisation.pdf> [accessed 10th May 2020].

¹⁹³ Scottish Government Social Research, *Social Security Experience Panels: Personal Independence Payment health assessments* (Edinburgh: Scottish Government, 2019) 19 <https://www.gov.scot/publications/social-security-experience-panels-personal-independence-payment-health-assessments-main-report/>